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No. . . . . ., Misc.

IN THE

Supreme Court of the United States

October Term, 1987

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,
Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,
Defendants, *Respondents*

JOSEPH O. FAWCETT & SONS, INC., et al.,
Plaintiffs in Intervention. *Petitioners*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

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(Caption continued on inside front cover)

ANTELOPE COMPANY, a
limited partnership,
Plaintiff,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation,
et al.,
Defendants, *Respondents*

JOSEPH O. FAWCETT & SONS,
INC., et al.,
Plaintiffs in
Intervention. *Petitioners*

MOENCH INVESTMENT COMPANY,
LTD., a limited partnership,
Plaintiff,

vs.

UNION PACIFIC RAILROAD
COMPANY, a corporation,
et al.,
Defendants. *Respondents*

CHAMPLIN PETROLEUM COMPANY,
et al.,
Plaintiffs, *Respondents*

vs.

HOWELLS LIVESTOCK, INC.,
a corporation,
Defendant.

QUESTIONS PRESENTED

Were Petitioners' procedural due process rights to a hearing violated when a United States District Court ruled on the merits of Petitioners' case without giving Petitioners an opportunity to be heard on the merits and when the appellate court rejected Petitioners' arguments on the merits because they had not been raised below?

Was Petitioners' right of appeal to the appropriate United States Circuit Court of Appeals denied when Petitioners' grievance with the lower court decision was the fact that the lower court decided Petitioners' case on the merits without Petitioners having had an opportunity to be heard, and when the appellate court refused to hear Petitioners' argument because it had not been raised below?

LIST OF ALL PARTIES

The parties to the case known as Anschutz Land and Livestock Company, Inc. v. Union Pacific Railroad Company, et al., are the following: Anschutz Land and Livestock Company, Inc. brought the case. The plaintiffs in intervention are: JOSEPH O. FAWCETT & SONS, INC., a Utah corporation, ARLO C. FAWCETT, EYVONNE E. FAWCETT, LORIN O. FAWCETT, ROY H. FAWCETT, ARVILLA R. FAWCETT, WANETA S. FAWCETT, NADINE F. LYONS, JOHN A. LYONS, JERALD LANG FAWCETT, GAYLE G. FAWCETT, JOE C. FAWCETT, MARY R. FAWCETT, ELIZABETH FAWCETT, MYRNA BETH SHIPP, MARR O. FAWCETT, MILDRED C. FAWCETT, ADRIANNA L. MARKLAND, STARLENE LUTTRELL, BRENT PETERSON, ELDON GOLIGHTLY, DIANE F. REAVELEY, RAQUEL F. BULLOUGH, MARK C. FAWCETT, JUANNA M. DAVIS as Trustee for the MYRNA B. SHIPP IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the LeANN FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the RICHARD J. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the MICHAEL L. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the GAYLENE FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the ROBERT J. FAWCETT IRREVOCABLE TRUST, DIXIE F. SARGENT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the DIXIE FAYE FAWCETT SARGENT IRREVOCABLE TRUST, ROLANE F. CRITTENDEN, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the RUTH ROLANE FAWCETT CRITTENDEN IRREVOCABLE TRUST, COLLEEN FAWCETT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the COLLEEN FAWCETT IRREVOCABLE TRUST, GAYLE G. FAWCETT and ZIONS

FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS First National Bank as trustees for the Annette R. Fawcett Steven IRREVOCABLE TRUST, and ANTELOPE ISLAND CATTLE CO., INC., a corporation.

The defendants in the case are: UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation.

The parties to the case known as ANTELOPE COMPANY vs. UNION PACIFIC RAILROAD COMPANY, et al., are the following: ANTELOPE COMPANY, a limited partnership, brought the case. The Plaintiffs in intervention are: JOSEPH O. FAWCETT & SONS, INC., a Utah corporation, ARLO C. FAWCETT, EYVONNE E. FAWCETT, LORIN O. FAWCETT, ROY H. FAWCETT, ARVILLA R. FAWCETT, WANETA S. FAWCETT, NADINE F. LYONS, JOHN A. LYONS, JERALD LANG FAWCETT, GAYLE G. FAWCETT, JOE C. FAWCETT, MARY R. FAWCETT, ELIZABETH FAWCETT, MYRNA BETH SHIPP, MARR O. FAWCETT, MILDRED C. FAWCETT, ADRIANNA L. MARKLAND, STARLENE LUTTRELL, BRENT PETERSON, ELDON GOLIGHTLY, DIANE F. REAVELEY, RAQUEL F. BULLOUGH, MARK C. FAWCETT, JUANNA M. DAVIS as Trustee for the MYRNA B. SHIPP IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the LeANN FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the RICHARD J. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the MICHAEL L. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the GAYLENE FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the ROBERT J. FAWCETT IRREVOCABLE TRUST, DIXIE F. SARGENT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the DIXIE FAYE FAWCETT SARGENT IRREVOCABLE

TRUST, ROLANE F. CRITTENDEN, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the RUTH ROLANE FAWCETT CRITTENDEN IRREVOCABLE TRUST, COLLEEN FAWCETT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the COLLEEN FAWCETT IRREVOCABLE TRUST, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS First National Bank as trustees for the Annette R. Fawcett Steven IRREVOCABLE TRUST, and ANTELOPE ISLAND CATTLE CO., INC., a corporation.

The defendants are: UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation.

The parties to the case known as MOENCH INVESTMENT COMPANY, LTD. v. UNION PACIFIC RAILROAD COMPANY, et al., are the following: MOENCH INVESTMENT COMPANY, LTD., a Utah limited partnership, brought the case. The defendants in the case are: UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation.

The parties to the case known as CHAMPLIN PETROLEUM COMPANY vs. HOWELLS LIVESTOCK, INC. are the following: CHAMPLIN PETROLEUM COMPANY, a corporation, UNION PACIFIC RESOURCES CORPORATION, a corporation, and AMOCO PETROLEUM COMPANY, a corporation, brought the case. The defendant in the case is HOWELLS LIVESTOCK, INC., a corporation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes

Constitutional Provisions

Cases

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vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,
Defendants, *Respondents*

JOSEPH O. FAWCETT & SONS, INC., et al.,
Plaintiffs in Intervention. *Petitioners*

Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

Petitioners Joseph O. Fawcett & Sons, Inc., et al. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on the 2nd day of June, 1987. The Circuit Court's review, when taken together with the actions of the lower court, violated Petitioners' procedural due process rights guaranteed by the Fifth Amendment of the United States Constitution as well as Petitioners' right to appeal the decision of the United States District Court for the District of Utah.

OPINIONS BELOW

On July 31, 1984, the United States District Court for the District of Utah, the Honorable Bruce S. Jenkins presiding, granted Respondents' Motion for Summary Judgment. (The Opinion is unreported. It appears in the Appendix hereto at page A-1) Petitioners filed a Notice of Appeal with the United States Court of Appeals for the Tenth Circuit on August 24, 1984. The Court of Appeals affirmed the judgment of the District Court on June 2, 1987 which is reported at 820 F.2d 338 (10th Cir. 1987) and appears in the Appendix hereto at page A-19.

JURISDICTION

On June 15, 1987, these petitioners filed a Petition for Rehearing and suggestion for consideration en banc. The United States Court of Appeals for the Tenth Circuit denied the Petition on the 1st day of July, 1987. The denial appears in the Appendix hereto at page A-34. This Petition is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The applicable constitutional provision involved is the Fifth Amendment to the United States Constitution, which reads as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process

of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment V.

STATEMENT OF THE CASE

This is a unique case involving not only a violation of substantial procedural due process rights but the exercise of this Court's supervisory jurisdiction over lower federal courts, courts which, except for this case, have been the traditional bastions for the protection of those very rights.

The United States District Court for the District of Utah and the United States Court of Appeals for the Tenth Circuit violated Petitioners Joseph O. Fawcett & Sons, Inc., et al. (hereinafter "Fawcetts"), constitutional and statutory rights to notice and a full and fair hearing and to appeal a decision of a United States District Court. By reason of the combined action of those two courts, the Fawcetts were deprived of minerals rights in their land without notice, and were deprived of their right of appeal of the District Court's decision to the Court of Appeals.

In 1895 the Utah Territorial Supreme Court evaluated the effect of a clause reserving mineral rights in a deed executed by the Union Pacific Railway Company. See Adams v. Reed, 11 Utah 480 (1895). The clause read as follows:

> "Reserving, however, to the said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands, and to mine and remove the same, if found; and for this purpose it shall have the right-of-way over and across said lands, and space necessary for the conduct of said business thereon, without charge or liability for damage therefor."

Id. at 498-99. The Court declared the reservation to be an easement upon the land.

Two years later, the Union Pacific Railway Company deeded property to the Fawcetts' predecessor-in-interest. The

deed contained a mineral reservation clause identical to the one construed in Adams v. Reed as follows:

> "Reserving, however, to said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands, and to mine for and remove the same if found, and for this purpose it shall have right-of-way over and across said lands and space necessary for the conduct of said business thereon, without charge or liability for damage therefor."

It is significant that the ink was scarcely dry on the Adams v. Reed decision when the Union Pacific Railway Company deeded the propety to the Fawcett's predecessor-in-interest. Because of that decision the Union Pacific Railway Company could only have intended to reserve an easement in the minerals rather than a fee interest in the minerals--particularly in light of federal law which required railroads to divest themselves of the land granted by the federal government to assist in development of the Transcontinental Railroad. See Pacific Railroad Act of 1862, Ch. 120, 12 Stat. 489, as amended, Act of July 2, 1964, Ch. 216, 13 Stat. 356.

In the 1970's, one of the largest deposits of oil and natural gas in North America was discovered in Utah and Wyoming beneath the lands sold by the Union Pacific Railway Company to the Fawcetts' predecessor-in-interest. Subsequent to this find, the ownership of mineral rights in the Fawcetts' land became an issue of paramount importance.

To claim the mineral rights, the Union Pacific Railroad Company had to characterize the reservation clause in the Fawcetts' deed as a fee interest in the minerals because any lesser interest could arguably have been abandoned by 70 years of inaction, whereas a fee interest can never be abandoned.

Four related cases were filed in the United States District Court for the District of Utah to quiet title to the mineral estates in Utah and Wyoming. Each case was unique because different reservation clauses were involved and required the application of state law from Utah or Wyoming.

The Fawcetts entered the action as a plaintiff-in-intervention. The Fawcetts' claim as to one tract was different than that of any other plaintiff. It was the only deed in which a reservation clause should have been analyzed in accordance with Utah law. Defendants, realizing the uniqueness and strength of the Fawcetts' position, filed a Motion to Dismiss the Fawcetts' Complaint on the ground that it was barred by the doctrine of laches. A copy of the Motion to Dismiss appears at page A-36. The Memoranda filed with the trial Court addressed only the laches argument. In fact, the defendants asked the trial Court not to consider Fawcetts' claims on the merits but to dismiss their claim solely on the basis of laches. With respect to the other three actions, the defendants moved for summary judgment on the merits, claiming the deed reservations created a fee interest in the minerals.

The District Court heard the various Motions for Summary Judgment and the Motion to Dismiss the Fawcetts' Complaint on the basis of laches concurrently, despite the different grounds at issue in the various Motions. The trial Court ruled in all four actions that all clauses in all deeds (including the Fawcetts') reserved a fee interest in the mineral estate in favor of Union Pacific Railway Company. The Fawcetts' claim was not dismissed on the basis of laches. Indeed, the word "laches" was never mentioned in the Court's opinion. The Fawcetts' claim was decided on the merits in concert with the various other Summary Judgment Motions, depriving the Fawcetts of an opportunity to inform the Court of its unique position before the meaning of the reservation clause was even at issue. Defendants have never answered Fawcetts' Complaint.

The Fawcetts appealed to the Tenth Circuit Court of Appeals. The Appeal set forth what happened in the lower court and explained the strength of its unique position which they had never had an opportunity to argue before the lower court. The Tenth Circuit not only refused to consider the Fawcetts' position, but censured them for making arguments not made before the lower court--all this when the Railroad

had not argued that the Fawcett deed reservation constituted a fee simple interest in the minerals.

REASON FOR GRANTING THE WRIT

The Fawcetts now ask this Court to preserve their constitutional due process rights by referring the matter back to the trial Court for full consideration. Since these due process rights were denied by the Tenth Circuit Court of Appeals, they will be lost forever unless restored by the Court.

The Fifth Amendment to the United States Constitution provides:

> "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law."

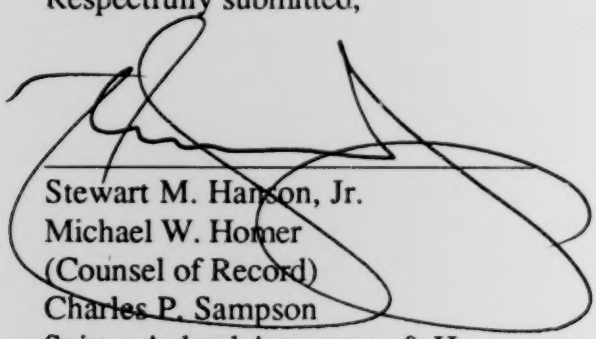
The federal judiciary is an adjunct of the federal government. The Fawcetts have been, without question, deprived of a property interest consisting of a legal claim to the minerals in their land. This deprivation occurred at the hands of the federal judiciary before the issues were joined or the Fawcetts were given the constitutionally guaranteed opportunity of being heard on the merits. Only this Court can protect the Fawcetts' right to a hearing on the merits. While this Court deals with more complex issues, none can be more essential than citizens' rights to fundamental procedural due process in proceedings before the federal courts.

Rule 3, Federal Rules of Appellate Procedure, guarantees unsuccessful parties the right to appeal to the appropriate United States Circuit Court of Appeals. Coppedge v. U.S., 369 U.S. 438, 441 (1962); Matter of McLinn, 739 F.2d 1395, 1398 (9th Cir. 1984). The Fawcetts have also been denied that right. The District Court procedurally precluded the Fawcetts of an opportunity to argue the merits of their case. When the Tenth Circuit refused to consider any arguments not raised in the lower court, it also denied the Fawcetts an opportunity to be heard on the merits.

CONCLUSION

The Fawcetts respectfully request the United States Supreme Court grant certiorari in this case. The grant is necessary to keep the Fawcetts' federal constitutional and statutory rights of procedural due process from being violated by the institution, the federal judiciary, which has been designated by the Constitution to protect those rights. This Court must direct the lower courts, under its supervision, not to dispose of the citizens' interest in property before the issues are properly joined and the parties are given notice and a full and fair hearing. Failure to grant certiorari will sanction the denial by the lower courts of the Fawcetts' fundamental right to procedural due process.

Respectfully submitted,



Stewart M. Hanson, Jr.
Michael W. Homer
(Counsel of Record)
Charles P. Sampson
Suitter Axland Armstrong & Hanson

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three (3) true and correct copies of the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit was mailed, First Class mail, postage prepaid this 25th day of September, 1987, to:

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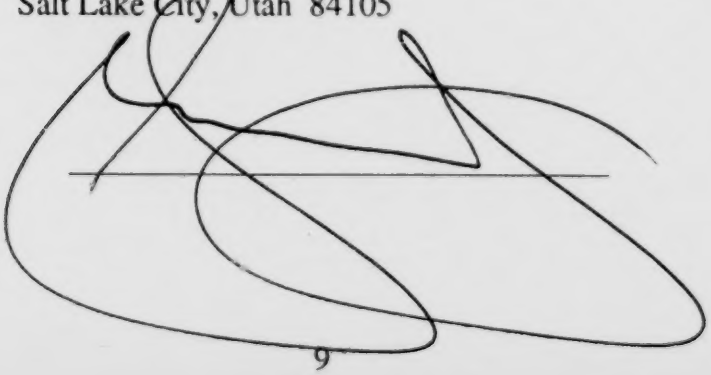

APPENDIX

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC CORPORATION, a corporation, et al.,

Defendants.

ANTELOPE COMPANY, a limited partnership,

Plaintiff,

vs.

UNION PACIFIC CORPORATION, a corporation, et al.,

Defendants.

JOSEPH O. FAWCETT & SONS, INC., a Utah corporation, et al.,

Plaintiffs in Intervention.

MOENCH INVESTMENT COMPANY, LTD., a Utah limited partnership,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,

Defendants.

CHAMPLIN PETROLEUM COMPANY, a corporation, et al.,

Plaintiffs,

vs.

HOWELLS LIVESTOCK, INC., a corporation,

Defendant.

MEMORANDUM OPINION

Civil Nos. C-77-0390J, C-77-0398J, C-79-0194J, C-77-0406J

Four related but separate actions to quiet title to the mineral estates of certain lands in Utah and Wyoming were filed in this court.[1] Various Motions for Summary Judgment in those related actions were filed and argued orally. Extensive memoranda were filed. Counsel argued the first of the motions on July 28, 1980[2], the second on July 22, 1983 and the remaining motions on November 1, 1983. In addition, Union Pacific Corp., Union Pacific Railroad Co. and Upland Industries Corp. filed a Motion to Dismiss for failure of plaintiffs to show that the moving defendants claimed an interest in the disputed mineral interests. Plaintiffs did not oppose that motion. The court granted that motion on November 1, 1983.

Counsel of record for the various parties are as follows: Floyd Abrams, Esq., Leonard Spivak, Esq., Dean Ringel, Esq., Robert Martin, Esq., Lee Thompson, Esq., Edward W. Clyde, Esq. and Rodney Snow, Esq. for Anschutz Land and Livestock Co., Inc., Antelope Island Cattle Co., Inc., Moench Investment Co., Ltd. and Howells Livestock, Inc.; Daniel Gribbon, Esq., Russell Carpenter, Esq., Leonard J. Lewis, Esq., Alan Sullivan, Esq., Samuel Gauffin, Esq. and B. J. Zimmerman for Champlin Petroleum Co., Union Pacific Railroad Co., Union Pacific Land Resources Corp. and Upland Industries; Ewing Werlein, Esq., Page Austin, Esq.,

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[1] Antelope Island Cattle Co., Inc., v Railroad Co., No. C-77-0389J (D. Utah filed Nov. 28, 1977); Anschutz Land and Livestock Co., Inc. v. Union Pacific Railroad Co., No. C-77-0390J (D. Utah filed Nov. 28, 1977); Champlin Petroleum Co. v. Howells Livestock, Inc., No. C-77-0406J (D. Utah filed Dec. 13, 1977); and Moench Investment Co., Ltd. v. Union Pacific Railroad Co., No. C-79-0194J (D. Utah filed April 4, 1979). A complaint in intervention was also filed in Antelope Island, supra, No. C-77-0389J on January 18, 1983. These actions have not been consolidated. Each complaint, however, raises the same issues. The summary judgment motion in Anschutz, supra, No. C-77-0390J addresses each of those issues. Thus, the court's opinion resolves the identical issues in all four cases.

[2] This motion was stayed pending the appeal of Union Pacific Land Resources Corp. v. Moench Investment Co., Ltd., 495 F. Supp 876 (D. Wyo.1980), which is now complete. Union Pacific Land Resources Corp. v. Moench Investment Co., Ltd., 696 F.2d 88 (10th Cir. 1982).

Harry O. Hickman, Esq., Stephen H. Anderson, Esq. and Kent Murdock, Esq. for Amoco Production Co.; and Stewart M. Hanson, Jr., Esq., David Olsen, Esq. and William Cayias, Esq. for intervenors. After due consideration of lengthy oral arguments and voluminous memoranda, the court enters this Memorandum Opinion and Order.

FACTS

These actions seek to quiet title to the mineral interests claimed by plaintiffs in lands located in Wyoming and Utah. The subject properties, including mineral interests, were included in the land grant lands made available to the Union Pacific Railroad (the Railroad) or its predecessor under the Pacific Railroad Act of 1862, Ch. 120, 12 Stat. 489, as amended by the Act of July 2, 1864, Ch. 216, 13 Stat. 356. That Act granted certain odd-numbered sections of public land to the Railroad to aid in its construction. Platt v. Union Pacific Railroad Co., 99 U.S. 48 (1878) . After receipt from the United States, the lands at issue were conveyed by the Railroad to plaintiffs' predecessors by deed. Plaintiffs[3] claim to be the undisputed successors in interest to the surface rights of those lands. Defendants generally do not dispute the plaintiffs' claims to those surface rights. Plaintiffs assert that the deeds executed by the Railroad conveyed to their predecessors as well the mineral interests underlying those lands such as oil, gas and other associated hydrocarbons. Plaintiffs claim to have succeeded to those mineral interests. Defendants, Champlin and Union Pacific Land Resources, Corp. (UPLRC), the successors in interest to the Railroad, claim the deeds made no conveyance of those mineral interests, and further claim that the deeds reserved the mineral interests and conveyed only the surface rights. Champlin and UPLRC claim ownership interests of the reserved minerals.

[3] For brevity Anschutz, Antelope, Moench, Howell and plaintiffs in intervention will be referred to as plaintiffs throughout this opinion, although Howell is a defendant in No. C-77-0406J. Champlin, UPLRC and Amoco will be referred to as the defendants.

Defendent Amico claims to have succeeded to certain oil and gas leasehold interests conveyed to Amoco by certain other defendants.

UNION PACIFIC ACT CLAIM

Plaintiffs initially argued that the Railroad's mineral reservations in the underlying deeds were contrary to the meaning and intent of the Union Pacific Railroad Act (UPA) and, therefore, were void. Plaintiffs, however, concede that the Tenth Circuit's decision in Union Pacific Land Resources Corp.v. Moench Investment Co., Ltd., 696 F.2d 88 (l0th Cir. 1982) controls and is adverse to their claim. Transcript of hearing on Motion for Summary Judgment, at 80 (November 1, 1983), Anschutz Land & Livestock Co., Inc. v. Union Pacific Railroad Co., No. C-77-0390J (D. Utah filed Nov. 28, 1977). Moench disposes of plaintiffs' UPA claim.

MINERAL RESERVATION CLAIMS

Plaintiffs assert that the mineral reservations in the underlying deeds are ambiguous. They claim extrinsic evidence should be admitted to clarify the claimed ambiguity as to which minerals the defendants or their predecessors intended to reserve. The Railroad generally used three forms of reservation in the various deeds involved in these actions. The first form of reservation reads as follows:

> Excepting and Reserving to said Union Pacific Railroad Company, its successors and assigns:
> FIRST: All coal and other minerals within or underlying said land.
> SECOND: The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said land, all coal and other minerals which may be found thereon by anyone.

THIRD: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right-of-way to and from such prospect places, or mines, and for the convenient and proper operation of such prospect places, mines, and for roads and approaches thereto or for removal therefrom of coal, mineral, machinery, or other material.

(hereinafter "Reservation A"). The second form of reservation reads as follows:

Excepting and Reserving to said Union Pacific Railroad Company, its successors and assigns:

FIRST: All oil, coal and other minerals within or underlying said lands.

SECOND: The exclusive right to prospect in and upon said land for oil, coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said land, all oil, coal and other minerals which may be found thereon by any one.

THIRD: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such oil, coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right-of-way to and from such prospect places or mines, and for the convenient and proper operation of such prospect places, mines, and for roads and approaches thereto or for removal therefrom of oil, coal, mineral, machinery, or other material.

(hereinafter "Reservation B"). The third form of reservation reads as follows:

Reserving, however to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and

> underlying said lands and to mine for and remove the same if found and for this purpose it shall have right of way over and across said lands, and space necessary for the conduct of said business thereon without charge or liability for damage therefor.

(hereinafter "Reservation C").

Plaintiffs assert that language in paragraphs two and three of Reservations A and B, and similar language in Reservation C, create an ambiguity in the term "other minerals"and thus the court should receive extrinsic evidence. Plaintiffs argue that the specific enumeration of the hard rock mineral "coal" and the references to mining rather than drilling, create an ambiguity about which minerals the parties intended to include in the term "other minerals". Plaintiffs argue further that extrinsic evidence, if admitted, will show that the parties did not intend to reserve oil and gas interests. Defendants, however assert that the deeds are not ambiguous and that "other minerals" includes oil and gas as a matter of law.

WYOMING LANDS

Since these actions are based on diversity Jurisdiction, Wyoming substantive law governs the interpretation of the deeds involving Wyoming lands. Although no Wyoming state court has ruled on these issues, plaintiffs concede that the Tenth Circuit's decisions in Union Pacific Land Resources Corp. v. Moench Investment Co., 696 F.2d 88 (l0th Cir. 1982)(Moench), Guild Trust v. Union Pacific Land Resources Corp., 682 F.2d 208 (l0th Cir. 1982)(Guild 11) and Amoco Production Co. v. Guild Trust, 636 F.2d 261 (l0th Cir. 1980)(Guild 1) defeat their claims regarding the Wyoming lands. Transcript, at 81. These three cases dispose of plaintiffs' claims regarding the Wyoming lands.

UTAH LANDS

Utah substantive law governs the interpretation of the deeds involving Utah lands. It is well established Utah law that the intent of the maker of an instrument must "be ascertained first from the four corners of the instrument itself." Continental Bank and Trust Co. v. Bybee, 6 Utah 2d 98, 306 P.2d 773, 775 (1957). See also Williams v. First Colony Life Insurance Co., 593 P.2d 534, 536 (Utah 1979); Big Butte Ranch, Inc. v. Holm, 570 P.2d 690, 691 (Utah 1977). If an instrument is not ambiguous, extrinsic evidence will not be admitted. Hartman v. Potter, 596 P.2d 653, 656 (Utah 1979); Williams, 593 P.2d at 536. Whether an instrument is ambiguous is a matter of law, Morris v. Mountain States Telephone and Telegraph Co., 658 P.2d 1199, 1200 (Utah 1983). Where the terms are clear and complete, the interpretation of the instrument is also a matter of law. Id. at 1201.

Plaintiffs agree with defendants that Western Development Co. v. Nell, 4 Utah 2d 112, 288 P.2d 452 (1955) is controlling. The plaintiffs, however, disagree on the meaning of Nell. Transcript, at 53-54. In Nell the Utah court considered a reservation and a granting clause. The reservation reads: "Reserving unto the said grantor, its successors and assigns all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights." Id. at 453. The grant reads in pertinent part: "[T]he Parties...do grant, bargain, sell and convey... unto the said party of the second part, its successors and assigns, all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights...." Id. The Utah court stated that if it were required to construe those paragraphs alone, it would "have no hesitation in endorsing and applying the majority rule that a reservation of 'minerals' retains the rights to gas and oil unless a contrary intention is manifested." Id. at 454. The court, however, held that other language in the reservation and grant created an ambiguity in the term "minerals". The court stated that in addition to the specific enumeration of hard rock minerals, the deed granted

easements and other rights appropriate to mining hard rock minerals, such as the right to build "coal mine appurtenances". The language, however, did not include "grants...appropriate to the development of oil upon the land". The language referring to the mining of hard rock minerals and the absence of language referring to the mining of oil and gas created a sufficient ambiguity to justify the admission of extrinsic evidence of intent. Id.

Plaintiffs' argue that ambiguities similar to the ambiguities in Nell exist here. In the opinion of this court, the language in paragraphs two and three of Reservation A is clear and without ambiguity. The language in Nell is much more restrictive than the language in Reservation A. The first clause of the reservation in Nell enumerated five specific hard rock minerals, including other "ores" and referred to "mines and mining rights." That clause also refers to "minerals", which taken alone may include oil and gas. But, when read in context with the enumerated hard rock minerals and the clauses reserving the right to build "coal mine appurtenances," the Nell reservation contains no language broad enough to allow for oil and gas extraction.

The language in Reservation A is far broader. The second paragraph of Reservation A reserves the "exclusive right...to mine for and remove...all coal and other minerals...."

The third paragraph reserves the

> right of ingress, egress and regress... to prospect for, mine and remove...coal or other minerals, and the right to use...land as may be convenient or necessary for the right of way to and from such prospect places, or mines, and for the convenient and proper operation of such prospect places, mines, and for roads and approaches thereto or for removal...of coal, mineral... or other material.

That language grants the surface use of the land for the "removal" of all minerals. The term "removal" is broad enough to include extraction of oil and gas by the drilling of a well.

The reservation's use of "prospect places" and "to prospect for" is similarly broad enough to include oil and gas wells, as well as hard rock mines. Prospect as a noun is defined as "[t]he location or probable location of a mineral deposit." The American Heritage Dictionary 995 (2d ed. 1982). As a verb, prospect is defined as "To search for or explore" for minerals. Id. A prospector is "[o]ne who explores an area for natural deposits such as gold or oil." Id. See also Crighton v. State, 128 S.W.2d 823 (Tex. Civ. App. 1939) (the term prospect was used in reference to petroleum and natural gas). Limiting "prospect" exclusively to hard rock mines would be too restrictive.

Furthermore, the punctuation used and use of the disjunctive term "or" also indicates that "prospect places" was not limited to hard rock "mines" but was far broader. Indeed, if the parties had intended hard rock mines only, the use of "prospect places" in addition to the use of "mines" would have been superfluous.

This court holds that the language in Reservation A is plain, clear and without ambiguity. The term "other minerals" includes oil and gas. This court holds further that, if the Utah Supreme Court were presented with the precise issue before this court, it would hold as a matter of law that the term "other minerals" in Reservation A includes oil and gas.

Plaintiffs' argument is less persuasive concerning Reservation B. Reservation B reserves to defendants all "oil, coal and other minerals". This is plain and without ambiguity. Paragraphs two and three of Reservation B are identical to those in Reservation A. When read in conjunction with the express reservation, those paragraphs contemplate the extraction of oil and the access to accomplish the extraction. This court holds that the language in Reservation B is plain, clear and without ambiguity. The term "other minerals" includes gas as a matter of law. Furthermore, if faced with that precise issue, the Utah Supreme Court would so hold.

The language in Reservation C is substantially the same as the language in Reservations A and B. This court holds that the term "other minerals" in Reservation C includes oil and gas as a matter of law.

Plaintiffs assert that whether or not "other minerals" includes oil and gas, Reservation C is simply a license, revocable at the will of plaintiffs. Plaintiffs argue that Reservation C is similar to the reservation construed in Radke v. Union Pacific Railroad Co., 138 Colo. 189, 334 P.2d 1077 (1959) and urge the court to follow Radke. Defendants urge the court to follow Guild Trust v. Union Pacific Land Resources Corp., 475 F. Supp. 726 (D. Wyo. 1979) , aff'd, 628 F.2d 208 (10th Cir. 1982), and hold that the reservation of an exclusive and unrestricted right to remove minerals effects a severance of the mineral estate from the surface, creating an identifiable and separate fee interest in the mineral estate.

Construing a reservation identical to Reservation C, the Colorado Supreme Court held in Radke that no present identifiable reservation of a mineral interest was made. The court held that only a right to prospect was reserved. Until the mineral had been discovered or removed, no interest, other than a right to prospect, was reserved. 334 P.2d at 1082-83, 1088-89. The railroad's interest was a mere license, subject to revocation by the owner in fee. Id. at 1089. The court stated further that the exclusive nature of the right was immaterial. Id. at 1083. Thus, the Colorado court held that since the railroad had not discovered or begun to remove any minerals prior to the conveyance to the grantee, the railroad's license to prospect had been revoked by that conveyance. Id. at 1089.

Reservation C is identical to the Radke reservation. However, it is the opinion of this court that Utah would not follow Radke. In Adams v. Reed, 11 Utah 480, 40 P. 720 (1895), the plaintiffs in that case sold certain property, which they had acquired from the Union Pacific Railroad Co. Plaintiffs represented that they owned and had good title in fee simple to the property. At closing, defendants refused to consummate the purchase, claiming a title defect. Plaintiffs brought suit to compel execution of the sale and defendants sought Rescission of the sale contract because of plaintiffs' failure to provide good title. Id.

Defendants asserted that one of the title defects was a reservation contained in the deed executed by the Railroad. Id. at 723. That reservation read as follows:

> Reserving, however, to the said Union Pacific Railway Company the right to prospect for coal and other minerals within and underlying said lands, and to mine and remove the same, if found; and for this purpose it shall have the right of way over and across said lands, and space necessary for the conduct of said business thereon, without charge or liability for damage therefor.

Id.[4] The Utah Territorial Supreme Court held that the reservation created an encumbrance upon the land and title and allowed Rescission. Id.

The United States Supreme Court affirmed that decision on appeal. Adams v. Henderson, 168 U.S. 573 (1897). The Court stated that the railroad had no legal obligation to release the reservation and that plaintiffs had no power to compel the release. Id. at 580. It held that the defendants could not be forced to "take and pay for land incumbered with the right of the railroad company for all time..." Id.

The Utah Supreme Court interpreted a similar "exclusive right" provision in 1967 regarding grazing rights. In Russell v. Geyser-Marion Gold Mining Co., 18 Utah 2d 363, 423 P.2d 487 (1967), plaintiffs brought suit to quiet title in grazing rights against defendants. In 1934, plaintiffs' predecessor conveyed certain land to defendants' predecessor. The deed contained the following clause:

> The Grantee...agrees that the Grantor shall have the right to use the surface of the ground for grazing purposes, the grazing to be done in such a manner as not to interfere with any mining that the Grantee elects to do. The Grantors agree to pay one-half of the general taxes assessed against the land, as long as it is not used for mining purposes.

Id. at 488-89.

Defendants' argument, in pertinent part, was twofold. Defendants argued that the original grantor's interest under this

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[4] Reservation C is identical to the reservation in Adams.

provision was merely a license, personal and non-transferable. Therefore, when the grantor first attempted to transfer his grazing rights, the license was revoked. Defendants also argued that Utah Code Ann. § 57-1-3 (1953) applied. Section 57-1-3 states, "A fee simple title is presumed to be intended to pass by a conveyance of real estate, unless it appears from the conveyance that a lesser estate was intended." Id. Defendants argued that § 57-1-3 required the court to construe the deed as creating a fee simple interest in the original grantee. Id. at 489-90.

The court rejected both arguments. First, the court held that § 57-1-3 was inapplicable because the disputed provision indicated that plaintiffs' predecessor did intend to convey a lesser estate. Id. at 490. Second, the Court held that the provision created a "reservation of grazing rights" and not a mere license. The court stated that the only limitation upon the grantor was to not interfere with the grantee's mining rights. Otherwise, the grazing rights were unrestricted. Those rights were also held to be transferable. Id. at 490-91.

It is correct that neither the court in Adams nor Russell specifically categorized the interest reserved. Both courts, however, rejected the claim that a mere license, revocable at will, had been created. If those interests had been licenses, an unencumbered fee simple interest could have been acquired in Adams and Russell by mere revocation, effective by transfer or otherwise. The Utah Courts' rejection of such claims is significant here and provides this court with the necessary guidance. It is the opinion of this court that, if the Utah Supreme Court were faced with the choice presented here, it would not adopt the Radke position.

Plaintiffs also argue that absent specific language indicating an intent to reserve a perpetual right, the reserved right is merely personal to the original grantor. Plaintiffs contend that this is why the Radke reservation and Reservation C differ from the Guild II reservation. In Guild II the railway reserved the exclusive right to prospect and mine not only to itself but to "its successors, grantees, or assigns." 682 F.2d at 210. The absence of such language is immaterial. The trial judge in Guild II, stated the majority rule as follows:

> Under property law, a reservation of an exclusive and unrestricted mining right is in effect a severance of the mineral estate from the surface estate which creates a fee simple estate in the minerals in place. IA Thompson On Real Property § 160 at p. 37; 6 Thompson § 3096 at pp.817-818 (replacement volumes 1964 and 1962); 58 C.J.S. Mines and Minerals § 155 at pp. 317-318; Caldwell v. Fulton, 31 Pa. St. 475, 72 Am. Dec. 760 (Pa. 1858); List v. Cotts, 4 W.Va. 543, 545 (1871); Massot v. Moses, 3 S.C. 168, 16 Am. Rep. 697 (1871); Lee v. Bumgardner, 86 Va. 315, 10 S.E. 3 (1889); Outlaw v. Gray, 163 N.C. 325, 79 S.E. 676 (1913); Gray-Mellon Oil Co. v. Fairchild, 219 Ky. 143, 292 S.W. 743, 745-46 (1927); Bostic v. Bostic, 199 Va. 348, 99 S.E.2d 591, 66 A.L.R. 2d 971 (1957); Picard v. Richards, 366 P. 2d 119, 123 (Wyo. 1961); Clevenger v. Continental Oil Co., 149 Colo. 417, 369 P.2d 550 (1962); Kirby Lumber Corp. v. Claypool, 438 S.W.2d 655 (Tex. Civ. App. 1969); Mauch v. Ballou, 499 P.2d 591, 593 (Wyo. 1972).See also cases cited in 66 A.L.R.2d 978 (1959); 31 Rocky Mt. L. Rev. 393 (1959); 6 Utah L. Rev. 435, 437 (1959); 7 U.C.L.A. Law Rev. 383 (1960) and 2 Rocky Mountain Mineral Law Institute 1, 17 (1956).

475 F. Supp. at 727-28. The basis for the rule is not the redundant language, but the exclusive and unrestricted nature of the interest reserved.

Although the Tenth Circuit acknowledged the distinction in language between the Guild II and Radke reservations, its observation was limited to plaintiffs' estoppel argument. 682 F.2d at 211-12. In its discussion concerning the nature of the interest reserved, the court made a passing reference to Radke and noted its minority rule status. Id. at 210. The Tenth Circuit stated, "The Section 5 reservation has no time

restriction, is an exclusive right, without limitations or conditions." Id. Judge Kerr's opinion also makes no reference to the distinction in language between the two reservations. See 475 F. Supp. 726.

Several cases fortify the position that the absence of the language "its Successors, Grantees or Assigns" is not critical. In Gray-Mellon Oil Co. v. Fairchild, 292 S.W. 743 (Ky. 1927), the "exclusive privilege of making, mining and getting oil on or from the lands" was conveyed to the grantee only.Id. at 745. In Kirby Lumber Corp v. C.B. Claypool, 438 S.W.2d 655 (Tex. Civ. App. 1969), the grantor reserved only to himself "the right to enter upon...said lands and prospect for oil and other minerals thereon and in case such oil or other minerals are discovered, he reserves the right to take and remove the same." Id. at 656. Both courts held that it was the exclusive and unrestricted nature of the right that severed the mineral estate from the surface. 292 S.W. at 745-46; 438 S.W.2d at 656-57. The grantee in Kirby Lumber asserted a claim identical to plaintiffs; the grantee argued that the absence of language reserving the right in the grantor's heirs and assigns rendered the right a mere license. That argument was rejected by the Texas court. 438 S.W.2d at 656-57. Moreover, the reservation in Russell v. Geyser-Marion Gold Mining Co. reserved the exclusive grazing rights to the original grantor only. The Utah Supreme Court, however, held that that exclusive right was transferable. 423 P.2d at 490-91.

The unrestricted and exclusive nature of Reservation C is the important consideration in determining the interest held by defendants. There is no limitation on the time or quantity of minerals that could be extracted. Plaintiffs predecessors placed no restrictions on the manner in which those minerals could be extracted. The Railroad was neither obligated to pay a royalty nor was it liable for any damage caused by its operations. The right belonged exclusively to the Railroad. Neither the surface owners nor their assigns or successors could simultaneously remove minerals from those lands. Based upon Adams, Russell and the exclusive and unrestricted nature of Reservation C, this court holds that Reservation C

severs the mineral estate from the surface estate creating a fee simple estate in the minerals in place.[5]

CONTRACT VARIANCE CLAIM

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[5] Plaintiffs contend that those deeds which contain Reservation C relate to parcels of property which were never subject to the Sinking Fund Mortgage foreclosure which occurred in 1898 in the Circuit Court of the United States for the District of Colorado, Affidavit of Floyd Abrams In Opposition To Defendants' Motions To Dismiss or For Summary Judgment, Exhibit 18 at 1 (hereinafter Abrams' Affidavit), and thus plaintiffs claim, defendants did not succeed to the interest of the defaulting Railroad by such foreclosure and thus, are without interest now. Plaintiffs have submitted the Special Masters Report and the Final Decree confirming that Report in support of their assertion. In paragraph 55 of his report, the Special Master specifically states that the coal and other mineral interests held by the Railroad were subject to the Sinking Fund Mortgage. Abrams' Affidavit, Exhibit 17 at 30-31. The special Master further states in his conclusion to his Report:

> the Sinking Fund Mortgage...constitutes in legal effect...a paramount and superior mortgage and lien upon all and singular lands granted to said The Union Pacific Railroad Company under Acts of Congress...and also upon all the estate, rights, title, interests, claims, demands and reservation of coal, mining, minerals or other rights at law or equity....

Abrams' Affidavit, Exhibit 17 at 33.

Paragraph one of the Final Decree entered by the court states:

Ordered, adjudged and decreed as follows--that is to say:

That the Report of Howard S. Abbott, Special Master, to whom this cause was referred by order herein dated June 20th, 1898, which said report was filed in said cause on the 22nd day of November, 1898, be, and the same is hereby, in all respects approved and confirmed.

Abrams' Affidavit, Exhibit 18 at 2 (emphasis added).

The Final Decree further states in paragraph 20 that the purchaser at the foreclosure sale would receive "absolute title and right" to all the properties held by the Railroad, subject to the Sinking Fund Mortgage "whether said lands and rights are particularly described in this decree or the Master's said report and the schedules attached thereto or not." Abrams' Affidavit, Exhibit 18 at 25-26.

The record furnished to this court does not contain any metes and bounds description from which this court can determine with any degree of exactness whether the properties plaintiffs refer to were included in the foreclosure or not. Nor have plaintiffs called any such metes and bounds description to the court's attention. Absent more, all, it seems to this court, means all.

Plaintiffs assert a final claim. They contend that the reservations in some of the deeds reserve a greater mineral interest than originally stated in the sales contracts. The variations, of which plaintiffs complain, are of little substantive significance. Defendants listed eight deeds which contained reservations different from the reservations contained in the sales contracts.[6] See Memorandum in Support of Union Pacific Defendants' Motion to Dismiss the Second Amended Complaint or in the Alternative for Summary Judgment at 27, Anschutz Land and Livestock Co., Inc. v. Union Pacific Railroad Co., No. C-77-0390J. In each instance the sales contract contained a reservation identical to Reservation C. The deed executed by the Railroad, however, contained a reservation identical to Reservation A. In light of the court's holding, supra, at 18, there is no substantive difference between those reservations. Regardless of which instrument controls, the Railroad reserved the same interest under either reservation.

Under Utah law, the deed is the controlling document. The Utah Supreme Court stated:

> 'No rule of law is better settled than that, where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is functus officio, and the rights of the parties rest

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[6] Plaintiffs suggest in their opposition memorandum that some deeds were enlarged from no mineral reservation at all or merely a reservation of coal to coal and other minerals. See Plaintiffs Memorandum in Opposition to Motions to Dismiss or for Summary Judgment at 81, Anschutz Land and Livestock Co., Inc. v. Union Pacific Railroad Co., No. C-77-0390J. Plaintiffs, however, have not submitted sufficient documentary evidence to rebut defendants' motion for summary judgment. Although pleadings and other evidence must be interpreted in favor of the opposing party, Adickes v. S. H. Kress & Co., 398 U.S. 144, 157-59 (1970); Otteson J. United States, 622 F.2d 516, 519 (10th Cir. 1980), once a motion is properly supported, the opposing party may not rely on the mere allegations of the complaint. Rather the opposing party must present specific facts showing that there is a genuine issue for trial. Otteson, 622 F.2d at 519; Fed. R. Civ. P. 56(e).

> thereafter solely on the deed. This is so although the deed thus accepted varies from that stipulated for in the contract....'

Reese Howell Co. v. Brown, 48 Utah 142, 158 P. 684, 689 (1916)(quoting Slocum v. Bracy, 55 Minn. 22, 56 N.W. 826 (1893)). That principle was reaffirmed in Stubbs v. Hemmert, 567 P.2d 168 (Utah 1977). The Utah Supreme Court stated in Stubbs:

> Execution and delivery of a deed by the seller then usually constitute full performance on his part, and acceptance of the deed by the buyer manifests his acceptance of that performance even though the estate may differ from that promised in the antecedent agreement. Therefore, in such a case, the deed is the final agreement and all prior terms, whether written or verbal, are extinguished and unenforceable.

Id. at 169 (footnote omitted). See also Rasmussen v. Olsen, 583 P.2d 50, 53 (Utah 1978)("when a deed is given in full execution of a contract of sale of land, all provisions of the prior contract are merged therein").

An exception to this rule exists where either mutual mistake or fraud can be shown. Plaintiffs suggest that the variances may have been caused by the fraud or mistake of a predecessor of defendants. See Plaintiffs Memorandum in Opposition to Motions to Dismiss or for Summary Judgment at 84-86. None of the plaintiffs have alleged fraud or mistake by a predecessor of defendants or asserted that any of plaintiffs' predecessors was defrauded or misled. Plaintiffs do not plead that they were defrauded or misled in any way when they purchased the subject lands. At the very least, plaintiffs had constructive knowledge of the long existing reservations, which appear in the public record. Plaintiffs no where assert that they received from their immediate predecessors less than they bargained for. Plaintiff's variance claims are not persuasive.

It is the opinion of this court that the foregoing Memorandum Opinion resolves all the legal questions, which

are common to the four above entitled actions. The relief requested in the matter of Champlin Petroleum Co. v. Howells Livestock, Inc., Civil No. C-77-0406J goes beyond those common questions.

Accordingly, IT IS ORDERED that defendants Champlin Petroleum Co., Union Pacific Land Resources Corp. and Amoco Production Co. are entitled to summary Judgment in each of the following actions: Anschutz Land and Livestock Co., Inc., Civil No. C-77-0390J, Antelope Island Cattle Co., Inc., Civil No. C-77-0389J and Moench Investment Co., Ltd., Civil No.C-79-0194J. IT IS FURTHER ORDERED that plaintiffs Champlin Petroleum Co., Union Pacific Land Resources Corp. and Amoco Production Co. are entitled to partial summary Judgment in the matter of Champlin Petroleum Co. v. Howells Livestock Inc., Civil No. C-77-0406J. Counsel for plaintiffs Champlin and others shall prepare and submit an appropriate form of Judgment in Champlin, Civil No. C-79-0194 within ten days.

Dated this 31 day of July, 1984.

BRUCE S. JENKINS
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC CORPORATION, a corporation, et al.,

Defendants.

MOENCH INVESTMENT COMPANY, LTD., a Utah limited partnership,

Plaintiff-Appellant,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,

Defendants-Appellees.

ANTELOPE ISLAND CATTLE COMPANY, INC., a corporation,

Plaintiff-Appellant,

vs.

UNION PACIFIC CORPORATION, ET AL.,

Defendants-Appellees.

ANTELOPE ISLAND CATTLE COMPANY, INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,

Defendants-Appellees,

JOSEPH 0. FAWCETT & SONS, INC., a Utah corporation, et al.,

Plaintiffs in Intervention/Appellants.

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, et al.,

Defendants-Appellees,

JOSEPH 0. FAWCETT & SONS, INC., a Utah corporation, et al.,

Plaintiffs in Intervention/Appellants.

CHAMPLIN PETROLEUM COMPANY, a corporation, et al.,

Plaintiffs-Appellees,

vs.

HOWELLS LIVESTOCK, INC., a corporation,

Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

Civil Nos. 84-2195, 84-2198, 84-2199, 84-2227, 84-2228, 84-2445

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

(D.C. Civil Nos. C-77-389J, C-77-390J, C-77-406J and C-79-194J

Floyd Abrams of Cahill Gordon & Reindel, New York, New York (Robert Martin and Lee Thompson of Martin, Pringle, Oliver, Triplett & Wallace, Wichita, Kansas; Edward Clyde and Rodney Snow of Clyde, Pratt, Gibbs & Cahoon, Salt Lake City, Utah; and Leonard A. Spivak, Dean Ringel and John Sander of Cahill Gordon & Reindel, New York, New York, with him on the briefs), for Appellants Anschutz Land and Livestock Company, Inc., Antelope Island Cattle Company, Moench Investment Company, Ltd., and Howells Livestock, Inc.

Stewart M. Hanson, Jr. of Suitter Axland Armstrong & Hanson, Salt Lake City, Utah (David R. Olsen and Michael W. Homer of Suitter Axland Armstrong & Hanson, Salt Lake City, Utah, and William J. Cayias of Cayias, Livingston & Smith, Salt Lake City, Utah, with him on the briefs), for Plaintiffs in Intervention/Appellants.

Daniel M. Gribbon of Covington & Burling, Washington, D.C. (Leonard J. Lewis and Alan L. Sullivan of Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, and Russell H. Carpenter, Jr., and Laird Hart of Covington & Burling, Washington, D.C., with him on the brief for Defendant-Appellee Union Pacific Land Resources Corporation and Plaintiff-Appellee Champlin Petroleum Company; Charles T. Krol and Rebecca S. McGee, Amoco Production Company, Denver, Colorado; Ewing Werlein, Jr., and Page I. Austin of Vinson & Elkins, Houston, Texas; and Stephen H. Anderson and Kent H. Murdock of Ray, Quinney & Nebeker, Salt Lake City, Utah, on the brief for Defendant-Appellee Amoco Production Company), for Defendants-Appellees.

Before McKAY and TACHA, Circuit Judges, and BROWN*, District Judge.

McKAY, Circuit Judge.

Four related actions were filed in the United States District Court for the District of Utah to quiet title to the mineral estates of certain lands in Utah and Wyoming.[1] When plaintiffs' predecessors-in-interest originally bought the lands from the Union Pacific Railroad (or its predecessor) in the late nineteenth and early twentieth centuries, the Railroad executed deeds using one of three clauses purporting to retain all subsurface mineral interests in the Railroad.[2] The first of these reservations reads as follows:

> Excepting and Reserving to said Union Pacific Railroad Company, its successors and assigns: FIRST: All coal and other minerals within or underlying said land.

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*Honorable Wesley E. Brown, Senior United States District Judge for the District of Kansas, sitting by designation.

[1]The four plaintiffs in these actions were Anschutz Land and Livestock Company, Antelope Company, Moench Investment Company, Ltd., and Champlin Petroleum Company. Joseph O. Fawcett & Sons, Inc., thereafter intervened as plaintiffs in the Antelope Company action. The defendants below were the Union Pacific Railroad Company, Champlin Petroleum Company, Howells Livestock, Inc., and Amoco Production Company.

Although the cases were not consolidated, the resolution of the common legal issues in a single memorandum opinion disposed of all four cases. In the interest of brevity "plaintiffs" will be hereafter used in referring to all four plaintiffs as well as the plaintiff in intervention. "Union Pacific" or "Railroad" will be used in referring to all four defendants.

[2]The lands were usually sold for $1 per acre for grazing or agricultural purposes, a price the Railroad asserts was inadequate to justify including any mineral rights in the sale. See Answering Brief of Union Pacific Appellees at 3 n.6, 4.

SECOND: The exclusive right to prospect in and upon said land for coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said land, all coal and other minerals which may be found thereon by anyone.

THIRD: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right-of-way to and from such prospect places, or mines, and for the convenient and proper operation of such prospect places, mines, and for roads and approaches thereto or for removal therefrom of coal, mineral, machinery, or other material.

[hereinafter Reservation A]. The second form of reservation reads as follows:

Excepting and Reserving to said Union Pacific Railroad Company, its successors and assigns:

FIRST: All oil, coal and other minerals within or underlying said lands.

SECOND: The exclusive right to prospect in and upon said land for oil, coal and other minerals therein, or which may be supposed to be therein, and to mine for and remove, from said land, all oil, coal and other minerals which may be found thereon by anyone.

THIRD: The right of ingress, egress and regress upon said land to prospect for, mine and remove any and all such oil, coal or other minerals, and the right to use so much of said land as may be convenient or necessary for the right-of-way to and from such prospect places or mines, and for the convenient and proper operation of such prospect places, mines, and for roads and approaches thereto or for removal

> therefrom of oil, coal, mineral, machinery, or other material.

[hereinafter Reservation B]. The third form of reservation reads as follows:

> Reserving, however to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands and to mine for and remove the same if found and for this purpose it shall have right of way over and across said lands, and space necessary for the conduct of said business thereon without charge or liability for damage therefor.

[hereinafter Reservation C].

The plaintiffs claimed that: (1) the Pacific Railroad Act of 1862, ch. 120, 12 stat. 489, amended by Act of July 2, 1864, ch. 216, 13 stat. 356, prohibited the Railroad's reservation of the subsurface; (2) the Railroad never intended to reserve any interest in oil, gas, and other associated hydrocarbons when it used the words "other minerals" in Reservations A and C; (3) the Railroad never intended to reserve any interest in natural gas when it used the words "other minerals" in Reservation B; and (4) Reservation C was insufficient as a matter of law to reserve to the Railroad a fee interest in any minerals. The plaintiffs sought to introduce evidence extrinsic to the deeds themselves that allegedly illuminate the Railroad's intent contemporaneous with the execution of the deeds.

The Railroad moved for summary judgment, arguing that, as a matter of law, the various clauses used in the deeds encompassed oil and gas interests, were sufficient to reserve a fee interest in the Railroad, and comported with the Pacific Railroad Act. After examining extensive memoranda and hearing lengthy oral arguments on three separate occasions, the trial court entered a memorandum opinion and order, granting the Railroad's summary judgment motion and dismissing the various claims with prejudice. Plaintiffs appeal.

I.

Plaintiffs contend that the "settlement and pre-emption" proviso of the Pacific Railroad Act of 1862 rendered invalid all attempts to retain the subsurface of land grant lands.[3] We rejected this precise contention in Union Pacific Land Resources Corp. v. Moench Investment Co., 696 F.2d 88, 91-93 (10th Cir. 1982), cert. denied, 460 U.S. 1085 (1983). In addition to simply arguing that Moench was wrongly decided on this issue, plaintiffs attempt to distinguish it by stressing that the deeds in that case were all issued after the 1899 mortgage foreclosure sale to the Railroad of all the lands owned by the Railroad's corporate predecessor.[4] According to plaintiffs, Moench held only that because the entire fee interests were transferred through the foreclosure sale, the settlement and preemption proviso was satisfied before the later sales of the land that were at issue in that case. Some of the disputed deeds in the present case were issued before the 1899 foreclosure sale to the Railroad, and plaintiffs argue that Moench is not controlling as to those.

We disagree with plaintiffs for three reasons. First, we did not rest our decision in Moench solely on the factual finding that the lands in issue were deeded after the foreclosure sale, although we did discuss that argument as further support

---

[3] That proviso states:

> [A]ll such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and preemption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Pacific Railroad Act of 1862, ch. 120, § 3, 12 stat. 489, 492, amended by Act of July 2, 1864, ch. 216, § 4, 13 stat. 356, 358. Plaintiffs contend that "Congress did not [thereby] create a third option of selling the surface and retaining the subsurface." Brief of Appellants Anschutz Land and Livestock Co., Inc. at 46.

[4] For a concise discussion of the historical background surrounding the land grants to the Railroad's corporate predecessor, the mortgage of the granted lands, and the subsequent sale of such lands to the Railroad, see Moench Investment Co., 696 F.2d at 89-90.

for our holding. We squarely addressed the legal argument that the proviso "precluded the Railroad from retaining an interest in the mineral estate while selling the surface estate..." Id. at 91. We stated that "the language [does not] suggest that the [Railroad] was required to convey its entire fee to a purchaser." Id. at 92.

Second, plaintiffs' argument necessarily assumes that the proviso allowed the Railroad to retain the subsurface of lands it received in the foreclosure sale and thereafter sold, while that same proviso prohibited the Railroad's predecessor from doing likewise. No reading of the statute supports such an arbitrary distinction. The statutory language either allows reservation of the subsurface or it requires sale of the full fee, whenever the land was sold. We reiterate that "the language [does not] suggest that the [Railroad] was required to convey its entire fee to a purchaser." Id.

Finally, plaintiffs' factual premise fails. While some of the disputed deeds in this case were issued prior to the 1899 foreclosure sale, none were issued before the 1867 mortgage. The Supreme Court case on which we relied in Moench held that the 1867 mortgage was a "disposition" of the mortgaged lands within the meaning of the settlement and preemption proviso. See Platt v. Union Pac. R.R., 99 U.S. 48 (1879). Plaintiffs' focus on the year 1899 is therefore misplaced.

II.

State substantive law controls the resolution of real property claims. See Williams v. North Carolina, 317 U.S. 287, 294 n.5 (1942) ("state where the land is located is 'sole mistress' of its rules of real property"). Plaintiffs' claims regarding the Wyoming lands must fail. This court has on three prior occasions reviewed the same language in deeds issued from the same defendant, the Union Pacific, under Wyoming law. A unanimous panel in each held that the deed reservations validly reserved all minerals, including oil and gas, as a matter of law. See Moench Inv. Co., 696 F.2d at 93; Guild Trust.v. Union Pac. Land Resources Corp., 682 F.2d 208, 209-12 (10th Cir. 1982); Amoco Prod. Co. v. Guild

Trust, 636 F.2d 261, 264 (10th Cir. 1980), cert. denied, 452 U.S. 967 (1981). The Wyoming Supreme Court has not since ruled otherwise. We deny the plaintiffs' motion on appeal to certify these settled questions to that Court for reconsideration. Thus, the only issue remaining on appeal is whether Utah law requires the same result with respect to the Utah lands.

III.

Both the plaintiffs and the Railroad agree that Western Development Co. v. Nell, 4 Utah 2d 112, 288 P.2d 452 (1955), controls whether evidence of intent extrinsic to the deeds was properly ruled inadmissible in this case and whether the deeds were sufficient as a matter of law to reserve all oil and gas interests in the Railroad. The Utah district court judge stated that "if the Utah Supreme Court were presented with the precise issue before this court, it would hold as a matter of law that the term 'other minerals' in Reservation A includes oil and gas." Memorandum Opinion at 12. It ruled similarly as to Reservations B and C. See Id. at 12-13. Under the current rule in this circuit, we may not overturn the local district judge's interpretation of Utah law unless it is clearly erroneous. See Hauser v. Public Serv. Co., 797 F.2d 876, 878 (10th Cir. 1986) (in reviewing interpretation and application of state law by resident federal district judge in a diversity action, court of appeals is governed by clearly erroneous standard).

However, we need not resort to that rule in this case. We cannot improve upon the district court's persuasive reasoning and adopt it as dispositive. Chief Judge Jenkins held:

> In Nell the Utah court considered a reservation and a granting clause. The reservation reads: "Reserving unto the said grantor, its successors and assigns all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights." [288 P.2d] at 453. The grant reads in pertinent part: "[T]he Parties...do grant, bargain, sell and convey...unto the said party

of the second part, its successors and assigns, all the coal, gold, silver, lead, copper and other precious and valuable ores, minerals, mines and mining rights..." Id. The Utah court stated that if it were required to construe those paragraphs alone, it would "have no hesitation in endorsing and applying the majority rule that a reservation of 'minerals' retains the rights to gas and oil unless a contrary intention is manifested." Id. at 454. The court, however, held that other language in the reservation and grant created an ambiguity in the term "minerals". The court stated that in addition to the specific enumeration of hard rock minerals, the deed granted easements and other rights appropriate to mining hard rock minerals, such as the right to build "coal mine appurtenances". The language, however, did not include "grants...appropriate to the development of oil upon the land". The language referring to the mining of hard rock minerals and the absence of language referring to the mining of oil and gas created a sufficient ambiguity to justify the admission of extrinsic evidence of intent. Id.

Plaintiffs' argue that ambiguities similar to the ambiguities in Nell exist here. In the opinion of this court, the language in paragraphs two and three of Reservation A is clear and without ambiguity. The language in Nell is much more restrictive than the language in Reservation A. The first clause of the reservation in Nell enumerated five specific hard rock minerals, including other "ores" and referred to "mines and mining rights." That clause also refers to "minerals", which taken alone may include oil and gas. But, when read in context with the enumerated hard rock minerals and the clauses reserving the right to build "coal mine appurtenances," the Nell

reservation contains no language broad enough to allow for oil and gas extraction.

The language in Reservation A is far broader...[Its] language grants the surface use of the land for the "removal" of all minerals. The term "removal" is broad enough to include extraction of oil and gas by the drilling of a well.

The reservation's use of "prospect places" and "to prospect for" is similarly broad enough to include oil and gas wells, as well as hard rock mines. Prospect as a noun is defined as "[t]he location or probable location of a mineral deposit." The American Heritage Dictionary 995 (2d ed. 1982). As a verb, prospect is defined as "To search for or explore" for minerals. Id. A prospector is "[o]ne who explores an area for natural deposits such as gold or oil." Id. See also Crighton v. State, 128 S.W.2d 823 (Tex. Civ. App. 1939) (the term prospect was used in reference to petroleum and natural gas). Limiting "prospect" exclusively to hard rock mines would be too restrictive.

Furthermore, the punctuation used and use of the disjunctive term "or" also indicates that "prospect places" was not limited to hard rock "mines" but was far broader. Indeed, if the parties had intended hard rock mines only, the use of "prospect places" in addition to the use of "mines" would have been superfluous.

This court holds that the language in Reservation A is plain, clear and without ambiguity. The term "other minerals" includes oil and gas....

Plaintiffs' argument is less persuasive concerning Reservation B. Reservation B reserves to defendants all "oil, coal and other minerals". This is plain and without

> ambiguity. Paragraphs two and three of Reservation B are identical to those in Reservation A. When read in conjunction with the express reservation, those paragraphs contemplate the extraction of oil and the access to accomplish the extraction....The term "other minerals" includes gas as a matter of law...
>
> The language in Reservation C is substantially the same as the language in Reservations A and B.

Memorandum Opinion at 9-13.

Like the district court, we thus hold that the various clauses used in Reservations A, B, and C were sufficient to encompass oil and gas interests as a matter of law. Extrinsic evidence of intent was properly held inadmissible.

We also reject plaintiffs' alternative arguments with respect to Reservation C alone. They first contend that the subsurface of lands conveyed with deeds using Reservation C was never included in the 1899 foreclosure sale, and thus the Railroad never acquired valid title to the mineral estates. Even if the plaintiffs are correct, we fail to see why title to the mineral estates of such lands should now be quieted in them if the Railroad never had valid title to transfer to plaintiffs' predecessors. More to the point, however, is the district court's reasoning:

> In paragraph 55 of his report, the Special Master specifically states that the coal and other mineral interests held by the Railroad were subject to the Sinking Fund Mortgage. Abrams' Affidavit, Exhibit 17 at 30-31. The Special Master further states in his conclusion to his Report:
>
> > the Sinking Fund Mortgage... constitutes in legal effect...a paramount and superior mortgage and lien upon all and singular lands granted to said The Union Pacific Railroad Company under Acts of Congress...and also upon all the estate, rights, title, interests, claims,

> demands and reservation of coal, mining, minerals or other rights at law or equity....

Abrams' Affidavit, Exhibit 17 at 33.

Paragraph one of the Final Decree entered by the court states:

> Ordered, adjudged and decreed as follows--that is to say:
>
> That the Report of Howard S. Abbott, Special Master, to whom this cause was referred by order herein dated June 20th, 1898, which said report was filed in said cause on the 22nd day of November, 1898, be, and the same is hereby in all respects approved and confirmed.

Abrams' Affidavit, Exhibit 18 at 2 (emphasis added).

The Final Decree further states in paragraph 20 that the purchaser at the foreclosure sale would receive "absolute title and right" to all the properties held by the Railroad, subject to the Sinking Fund Mortgage "whether said lands and rights are particularly described in this decree or the Master's said report and the schedules attached thereto or not." Abrams' Affidavit, Exhibit 18 at 25-26.

> The record furnished to this court does not contain any metes and bounds description from which this court can determine with any degree of exactness whether the properties plaintiffs refer to were included in the foreclosure or not. Nor have plaintiffs called any such metes and bounds description to the court's attention. Absent more, all, it seems to this court, means all.

Memorandum Opinion at 20 n.5.

Plaintiffs make the additional argument that Reservation C created only a license to mine minerals, revocable at the

plaintiffs' will, and that it was insufficient to reserve to the Railroad a fee interest in the minerals themselves. The Colorado Supreme Court, in construing the identical language in a Union Pacific deed under Colorado law, agreed with plaintiffs' position. See Radke v. Union Pac. R.R. Co., 138 Colo. 189, ___, 334 P.2d 1077, 1088-89 (1959) (en banc). The majority rule to which most states subscribe is, however, to the contrary. That rule is: "Under property law, a reservation of an exclusive and unrestricted mining right is in effect a severance of the mineral estate from the surface estate which creates a fee simple estate in the minerals in place." Guild Trust v. Union Pac. Land Resources Corp., 475 F. Supp. 726, 727 (D. Wyo. 1979), aff'd, 682 F.2d 208 (10th Cir. 1982) (numerous treatise and case citations omitted).

After discussing pertinent Utah cases, the district court predicted that the Utah Supreme Court would follow the majority rule and decline to adopt Radke. See Memorandum Opinion at 16-17.We agree with the district court's holding. We thus hold that Reservation C was sufficient to reserve in the Railroad fee simple title to the mineral estate.[5]

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[5] One plaintiff, Joseph 0. Fawcett & Sons, advances a new legal theory on appeal. It argues that if Reservation C is not construed as creating a mere revocable license, neither should it be construed as reserving to the Railroad full fee title. Rather, it urges us to consider the possibility that the deed reserved only an easement in the Railroad.

"We have often said that new theories and issues not presented to the trial court, in the absence of extraordinary circumstances, which are not present here, will not be considered on appeal." Hanley v. Chrysler Motors Corp., 433 F.2d 708, 711 (10th Cir. 1970); see also United States v. Immordino, 534 F.2d 1378, 1381 (10th Cir. 1976); Harmon v. Diversified Medical Inv. Corp., 524 F.2d 361, 365 (10th Cir. 1975), cert. denied, 425 U.S. 951 (1976). This rule is particularly apt when dealing with a summary judgment, because the material facts are not in dispute and the trial judge considers only opposing legal theories.

Propounding new arguments on appeal in attempting to prompt us to reverse the trial court--arguments never considered by the trial court--is not only somewhat devious, it undermines important judicial values. The rule disciplines and preserves the respective functions of the trial and appellate courts. If the rule were otherwise, we would be usurping the role of the firstlevel trial court with respect to the newly raised issue rather than reviewing the trial court's actions. By thus obliterating any application of a standard of review, which may be more stringent than a de

novo consideration of the issue, the parties could affect their chances of victory merely by calculating at which level to better pursue their theory. Moreover, the opposing party would be effectively denied appellate review of the newly addressed issue, save in the rare instances of Supreme Court review. In order to preserve the integrity of the apellate structure, we should not be considered a "second-shot" forum, a forum where secondary, back-up theories may be mounted for the first time. Parties must be encouraged to "give it everything they've got" at the trial level.

MAY TERM - JULY 1, 1987

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Deanell R. Tacha and Honorable Bobby R. Baldock, Circuit Judges, and Wesley E. Brown, District Judge.

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,

Plaintiff-Appellant,

vs.

JOSEPH O. FAWCETT & SONS, INC., a Utah corporation, ARLO C. FAWCETT, EYVONNE E. FAWCETT, LORIN O. FAWCETT, ROY H. FAWCETT, ARVILLA R. FAWCETT, WANETA S. FAWCETT, NADINE F. LYONS, JOHN A. LYONS, JERALD LANG FAWCETT, GAYLE G. FAWCETT, JOE C. FAWCETT, MARY R. FAWCETT, ELIZABETH FAWCETT, MYRNA BETH SHIPP, MARR O. FAWCETT, MILDRED C. FAWCETT, ADRIANNA L. MARKLAND, STARLENE LUTTRELL, BRENT PETERSON, ELDON GOLIGHTLY, DIANE F. REAVELEY, RAQUEL F. BULLOUGH, MARK C. FAWCETT, JUANNA M. DAVIS as Trustee for the MYRNA B. SHIPP IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the LeANN FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the RICHARD J. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the MICHAEL L. FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the GAYLENE FAWCETT IRREVOCABLE TRUST, CLYDE C. NIELSON as Trustee for the ROBERT J. FAWCETT IRREVOCABLE TRUST, DIXIE F. SARGENT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the DIXIE FAYE FAWCETT SARGENT IRREVOCABLE TRUST, ROLANE F. CRITTENDEN, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the RUTH ROLANE FAWCETT CRITTENDEN IRREVOCABLE TRUST, COLLEEN FAWCETT, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the COLLEEN

FAWCETT IRREVOCABLE TRUST, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as Trustees for the SUSAN FAWCETT IRREVOCABLE TRUST, ANNETTE F. STEVENS, GAYLE G. FAWCETT and ZIONS FIRST NATIONAL BANK as trustees for the ANNETTE R. FAWCETT STEVENS IRREVOCABLE TRUST, and ANTELOPE ISLAND CATTLE CO., INC., a corporation,

Plaintiffs in Intervention,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Defendants-Appellees.

DENIAL OF PETITION FOR REHEARING

Civil Nos. 84-2195, 84-2198, 84-2199, 84-2227, 84-2228, 84-2445

Apellant's Joseph O. Fawcett and Sons, Inc., et al petition for rehearing is denied by the panel who decided the appeal on the merits.

No active judge of the court having requested a poll, the en banc suggestion is also denied.

Judge Stephen H. Anderson took no part in the consideration of the en banc suggestion.

ROBERT L. HOECKER, Clerk

By _____

Patrick Fisher
Chief Deputy Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

ANSCHUTZ LAND AND LIVESTOCK CO., INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Defendants

ANTELOPE ISLAND CATTLE CO., INC., a corporation,

Plaintiff,

vs.

UNION PACIFIC RAILROAD COMPANY, a corporation, CHAMPLIN PETROLEUM COMPANY, a corporation, UPLAND INDUSTRIES CORPORATION, a corporation, UNION PACIFIC LAND RESOURCES CORPORATION, a corporation, and AMOCO PRODUCTION COMPANY, a corporation,

Defendants.

JOSEPH O. FAWCETT & SONS, INC., a Utah corporation, et al.,

Plaintiffs in Intervention.

MOTION OF DEFENDANTS CHAMPLIN PETROLEUM COMPANY AND UNION PACIFIC LAND RESOURCES CORPORATION TO DISMISS THE COMPLAINT IN INTERVENTION OF JOSEPH O. FAWCETT & SONS, INC., et al., OR FOR SUMMARY JUDGMENT

Defendants Champlin Petroleum Company and Union Pacific Land Resources Corporation hereby move, pursuant to Fed. R. Civ. P. 12(b) (6), for an order dismissing the Complaint in Intervention of Joseph O. Fawcett & Sons, Inc., et al., for failure to state a claim upon which relief may be granted, or in the alternative for summary judgment in favor of defendants. As demonstrated in the attached memorandum in support of this Motion, the intervenors are barred by laches from asserting the claims presented in their Complaint in Intervintion.

Respectfully submitted,

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Corportion

No. 87-530

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

JOSEPH O. FAWCETT & SONS, INC., *Et Al.*,
Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, *Et Al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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October 27, 1987

QUESTION PRESENTED

Did Petitioners have a constitutional or statutory right to raise for the first time on appeal an argument that they failed to make to the District Court in opposing summary judgment motions that were dispositive of their claim?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-530

JOSEPH O. FAWCETT & SONS, INC., *Et Al.*,
Petitioners,

vs.

UNION PACIFIC RAILROAD COMPANY, *Et Al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

This Brief is submitted jointly by Respondents Union Pacific Resources Company (formerly Champlin Petroleum Company), Union Pacific Land Resources Corporation, and Amoco Production Company ("Respondents"), who were the appellees in the court below, in opposition to the Petition for Certiorari in this case.

Petitioners claim that the refusal of the Court of Appeals to consider a contention advanced by them with respect to a Utah state law question denied them due process of law. As shown below, that claim rests upon a wholly erroneous version of what transpired in the courts below and on a false premise that the language of the deed at issue in the Petition is different from that of the deeds of other parties. Accordingly, the Petition presents no issue that warrants review by this Court.

COUNTERSTATEMENT OF THE CASE

The Petition arises from a dispute as to the interpretation under Utah law of a 19th Century deed reservation of the "exclusive right to prospect for coal and other minerals . . . and to mine for and remove the same if found." The courts below held that this reservation created a fee estate in the minerals and was not, as the plaintiffs had argued, a revocable license. Petitioners, who had intervened in the District Court in support of the plaintiffs, argued for the first time on appeal that the interest reserved was an easement, and that the easement had been abandoned by non-development of the reserved minerals. They now claim that, by declining to address this untimely new argument, the Court of Appeals violated their Fifth Amendment rights and deprived them of their right of appeal.

These cases were brought in 1977 by Anschutz Land and Livestock Company and other large Utah landowners ("the plaintiffs") to dispute Respondents' ownership of the oil and gas underlying a portion of the Union Pacific land grant in Utah. The plaintiffs challenged the scope and effectiveness of three principal forms of mineral reservations contained in turn-of-the-century deeds from Union Pacific Railroad Company or a predecessor conveying surface rights to some 55,000 acres of Utah land-grant lands. Deeds to Wyoming land-grant lands were added by later amendment. Similar claims were litigated unsuccessfully by these plaintiffs and their affiliates in the District of Wyoming and

the Tenth Circuit, and were the subject of an unsuccessful petition for certiorari to this Court.[1]

After seven years of massive discovery, the District Court granted Respondents' motions for summary judgment as to all the forms of reservation at issue. These judgments were affirmed unanimously by the Court of Appeals. None of the plaintiffs has sought review of that decision.

Petitioners are successors in interest under a deed containing one of the three forms of Union Pacific mineral reservations challenged by the plaintiffs.[2] They petitioned to intervene in those suits five years after the suits were brought, asserting that "the questions of law involved in the plaintiff's Complaint are precisely the same as those of the proposed Complaint of the Intervenors" and that intervention should be allowed so that "identical lawsuits are avoided."[3] They also contended that they should have the benefit of the extensive litigation efforts already made on these claims by the plaintiffs.[4] The District Court allowed this belated intervention, but cautioned that the intervenors would take the case as they found it, including pending

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[1] *Union Pacific Land Resources Corp.* v. *Moench Investment Co.*, 696 F.2d 88 (10th Cir. 1982), *cert. denied*, 460 U.S. 1085 (1983); *Thousand Peaks Ranches, Inc.* v. *Union Pacific Land Resources Corp.*, No. C79-091K (D. Wyo., Jan. 24, 1983).

See also Amoco Production Co. v. *Guild Trust*, 636 F.2d 261 (10th Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); *Guild Trust* v. *Union Pacific Land Resources Corp.*, 682 F.2d 208 (10th Cir. 1982).

[2] Petitioners' complaint in intervention also relied on two deeds containing a different form of reservation, but the Petition does not seek review of the decision below as to such reservations.

[3] Memorandum in Support of Motion to Intervene, July 15, 1982, Opposition Appendix ("Opp. App"), pp. 2a-3a.

[4] Opp. App., pp. 7a-8a.

summary judgment motions that were among the motions adjudicated in the decision below.[5]

After Petitioners' intervention, Respondents filed additional summary judgment motions addressing among other things the "exclusive right to prospect" reservations contained in three of plaintiffs' deeds to Utah land. The wording of these reservations is identical to the reservation in Petitioners' deed.[6] The nature of the interest reserved by this form of reservation was extensively briefed on both sides. The plaintiffs argued that only a revocable license was reserved, and urged the court to follow a Colorado Supreme Court decision so construing this form of reservation under Colorado law. Petitioners did not brief this question separately, and at oral argument they adopted the plaintiffs' position.

The District Court concluded that Utah would not follow the aberrant Colorado decision and held that the "exclusive right to prospect" reservation gave the Respondents a fee estate in the minerals.[7] The Court of Appeals affirmed, holding that Utah would follow the majority rule, previously recognized by the Tenth Circuit, that "a reservation of an exclusive and unrestricted mining right is in effect a severance of the mineral estate from the surface estate which creates a fee simple estate in the minerals in place."[8]

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[5] Transcript of Oral Argument, Nov. 23, 1982, pp. 88-89.

[6] The reservations in plaintiffs' Utah deeds are quoted in Exhibit D to the Memorandum of the Union Pacific Defendants in support of their summary judgment motion in the District Court. Opp. App., p.10a. Petitioners' reservation is quoted on page 4 of the Petition.

[7] App., pp. A-10 to A-15.

[8] App., p. A-32, quoting *Guild Trust* v. *Union Pacific Land Resources Corp.*, 475 F. Supp. 726, 727 (D. Wyo. 1979), *aff'd*, 682 F.2d 208 (10th Cir. 1982).

On appeal, Petitioners parted company with the plaintiffs and argued for the first time that the "exclusive right to prospect" reservation created neither a fee nor a revocable license, but rather an easement. Petitioners further claimed — also for the first time — that Respondents had abandoned this easement by failing to develop the minerals. The Court of Appeals declined to consider these new questions on appeal, applying its settled rule that "new theories and issues not presented to the trial court, in the absence of extraordinary circumstances . . . ,will not be considered on appeal."[9] Petitioners do not challenge this rule, but contend that it should not have been applied to them because, so they now say, they had no opportunity to make their abandoned easement argument to the District Court.

ARGUMENT

The Petition is based entirely on the false premise that Petitioners were denied an opportunity to present their contention in the District Court. That claim is based, in turn, on the false premise that Petitioners had a unique claim, "different than that of any other plaintiff," in that theirs was the only deed containing an "exclusive right to prospect" reservation that presented a question under Utah law. (Pet. at 5.)

The reservation in Petitioners' deed is the same, word-for-word, as "exclusive right to prospect" reservations in plaintiffs' deeds. As Petitioners themselves recognized when seeking intervention below, the questions of law presented under these deeds are "precisely the same."[10] Moreover,

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[9] App. at A-32, quoting *Hanley* v. *Chrysler Motors Corp.*, 433 F.2d 708, 711 (10th Cir 1970). *See also United States* v. *Immordino*, 534 F.2d 1378, 1381 (10th Cir. 1976); *Harman* v. *Diversified Medical Inv. Corp.*, 524 F.2d 361, 365 (10th Cir. 1975), *cert. denied*, 425 U.S. 951 (1976).

[10] *See* Opp. App., p. 2a.

contrary to the assertion of the Petition, theirs was not "the only deed in which [the] reservation clause should have been analyzed in accordance with Utah law." (Pet. at 5.) Each of the plaintiffs' deeds containing identically worded reservations likewise conveyed Utah lands and were properly interpreted by the courts below under Utah law. The summary judgment motions addressed to the plaintiffs' deeds thus squarely raised the question presented by Petitioners' claim. The motions gave Petitioners just the opportunity they sought in their petition for intervention to have their claim decided as part of the larger cases and with the benefit of the plaintiffs' extensive litigation efforts and resources.

There is no comprehensible basis for the claim that Petitioners were denied an opportunity to make whatever argument they wished to make when these issues were presented to the District Court. The legal effect of the form of reservation contained in Petitioners' deed was briefed at great length by the plaintiffs,[11] as well as in two briefs and two reply briefs filed on behalf of Respondents. As parties to the suits, Petitioners had a full opportunity to address the issues they shared in common with the plaintiffs — issues which they had been advised could be determined pursuant to summary judgment motions addressed to the plaintiffs' claims.

Petitioners not only had but exercised this opportunity. They were represented at the oral argument on Respondents' summary judgment motions in the District Court by two different law firms, and one of their counsel presented a brief argument of his own.[12] Petitioners' argument was made after the plaintiffs' counsel had addressed at length

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[11] The plaintiffs devoted nearly 50 pages of their Memorandum in Opposition (pp. 32-80) to this question.

[12] Opp. App., pp. 13a-14a.

the "exclusive right to prospect" form of reservation at issue here.[13] At that time, Petitioners' counsel expressly "join[ed] in the arguments so ably made by the plaintiffs in this case."[14]

Indeed, when Petitioners' right to advance a new and different argument on appeal was challenged by Respondents in the Court of Appeals, Petitioners did not argue that they had been denied an opportunity to make their argument in the District Court. Instead, they strenuously denied that their argument "raised new issues or questions" and characterized the contention that it did so as "patently absurd."[15] Not until they petitioned for rehearing did they advance the unfounded claim that they had been foreclosed from making their case to the District Court.

In fact, the plaintiffs, supported by Petitioners, had good reason not to argue that the reservation in question was an abandoned easement rather than a license. First, they had the support of a case in a neighboring jurisdiction for their contention that the reservation was a license, whereas no case in any jurisdiction has held that such an exclusive and unrestricted mining right is an easement.[16] Second, in Utah an easement that is exclusive would be "tantamount to

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[13] Transcript of November 1, 1983, Oral Argument, pp. 67-80.

[14] Opp. App., p. 13a.

[15] Reply Brief of Appellants Joseph O. Fawcett & Sons, Inc. in the Court of Appeals, p. 6.

[16] Contrary to the Petition, the 1895 decision in *Adams* v. *Reed* did not hold that such a reservation was an easement. 11 Utah 480, 40 P. 720 (1895), *aff'd sub nom. Adams* v. *Henderson*, 168 U.S. 573 (1897). The question in *Adams* was whether the reservation prevented the owner of the land from conveying full title, and the court held that it did. The lower court opinion did refer to an "easement" in a dictum describing the reservation, which unquestionably includes an easement for "a right of way across and over" the lands; but the question of what property interest the reservation created was not before the court.

a conveyance . . . in fee simple," and thus could not be abandoned.[17] Third, even if the reservation had been no more than an easement, under Utah law it could be abandoned only by clear affirmative acts, not by a mere failure to develop the minerals. In Utah, as in most states, easements "may not be lost by non-use alone."[18] Instead, abandonment "requires action releasing the ownership and the right to use with clear and convincing proof of an intentional abandonment."[19] Petitioners have never even alleged any such affirmative action by Respondents, and none is evidenced in the record. In the absence of abandonment, Petitioners have no greater rights if the reservation is an easement than they do under the holding below that it is a fee.

In short, had Petitioners' untimely argument been considered, it would not have affected the outcome of the case. The plaintiffs prudently chose not to undercut their license argument by advancing such an unpromising claim. Having supported that strategy, Petitioners had no right to relitigate the case on a new theory after the District Court had rejected the only argument presented to it by either plaintiffs or Petitioners.

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[17] *Weggeland* v. *Ujifusa*, 14 Utah 2d 364, 384 P.2d 590, 591 (1963).

[18] *Western Gateway Storage Co.* v. *Treseder*, 567 P.2d 181, 182 (Utah 1977). *Accord Brown* v. *Oregon Short Line R.R. Co.*, 36 Utah 257, 102 P. 740, 742 (1909).

[19] *Harmon* v. *Rasmussen*, 13 Utah 2d 422, 375 P.2d 762, 765 (1962).

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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OPPOSITION APPENDIX

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IN THE

United States District Court

FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

ANSCHUTZ LAND AND LIVESTOCK, INC.,
a corporation,

Plaintiff,

and

ANTELOPE ISLAND CATTLE CO., INC.,

Plaintiff,

vs.

THE UNION PACIFIC CORPORATION, a corporation; **UNION PACIFIC RAILROAD COMPANY,** a corporation; **CHAMPLIN PETROLEUM COMPANY,** a corporation; **UPLAND INDUSTRIES CORPORATION,** a corporation; **UNION PACIFIC LAND RESOURCES CORPORATION,** a corporation; and **AMOCO PRODUCTION COMPANY,** a corporation,

Defendants.

JOSEPH O. FAWCETT & SONS, INC., a Utah corporation; ARLO C.

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Civil No. C-77-0390
and
Civil No. C-77-0389

an alien. The Court granted the applicant's Motion to Intervene on the ground that "her claim and the main action have a question of law in common; viz., the constitutionality of the challenged statute." *Teitschied* v. *Leopold*, 342 F. Supp., at 301.

In the present action, the factual circumstances giving rise to the claims of the plaintiffs and the factual circumstances giving rise to the claims of the INTERVENORS, are, for all practical purposes in this action, identical. Furthermore, the legal issues involved in resolving the claims of the plaintiffs and the claims of the INTERVENORS are virtually identical. The proposed Complaint filed by the INTERVENORS is substantially similar to the plaintiffs' Complaint, and both Complaints involve the same defendants. Because there are similar questions of fact and because the questions of law involved in the plaintiff's Complaint are precisely the same as those of the proposed Complaint of the INTERVENORS (to the extent they involve the same claims), this Court should grant INTERVENORS' Motion to Intervene.

C. Granting the INTERVENORS' Motion to Intervene Will Not Unduly Delay or Prejudice the Rights of the Original Parties.

As noted above, the legal issues advanced in the claims of the plaintiffs and the INTERVENORS are virtually

identical. The factual circumstances giving rise to both sets of claims are similar. Both the plaintiffs and the INTERVENORS seek to quiet title to their respective parcels of real property as opposed to the claims of the defendants. The defendants' claims to interests in the respective real property owned by plaintiffs and INTERVENORS originate in reservations contained in deeds from DEFENDANT U. P. RAILROAD to the respective predecessors-in-interest of the plaintiffs and the INTERVENORS. The substantial discovery completed to date is as applicable to the claims of these INTERVENORS as to the claims of plaintiffs.

Granting INTERVENORS' Motion to Intervene will not unduly delay the primary action. No trial date has been requested or set. INTERVENORS will not need to do substantial additional discovery. If intervention is granted, this action can proceed on a normal course to its conclusion while the needs of judicial economy are met, and respective, identical lawsuits are avoided. INTERVENORS, therefore, urge this Court to grant their Motion to Intervene.

CONCLUSION

The INTERVENORS' claims have questions of law in common with the main action, and the Motion to Intervene is

IN THE

United States District Court

IN AND FOR THE DISTRICT OF UTAH

BEFORE: THE HONORABLE BRUCE JENKINS

ANSCHUTZ LAND AND LIVESTOCK COMPANY, *Et Al.*,

Plaintiffs,

vs.

UNION PACIFIC RAILROAD COMPANY, *Et Al.*,

Defendants.

C-77-390 J

REPORTER'S PARTIAL TRANSCRIPT

November 23, 1982

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delay is this Court's inherent ability to manage its calendar so as to prevent any undue delay on the part of any party.

With regard to the prejudice, the defendants claim that they will be prejudiced by this intervention. Quite candidly, Your Honor, I'm not clear exactly how that will come about. They say the words, but it doesn't match up with the facts.

THE COURT: Well, anytime you get sued, you are prejudiced.

MR. HANSON: That's true, certainly. And if that is the prejudice they claim, I'll give them that one.

When you weigh their claim of prejudice with the beneficial effect on judicial economy which this --

THE COURT: I'm never much interested in judicial economy. It is always an interesting kind of argument. I have never really enjoyed that argument. People are always trying to save me time or save someone else time. In most litigation, you take the time that you have to take to do the best job that you can.

MR. HANSON: Sure. There is an aspect of judicial economy that relates to these defendants and to the proposed intervenors, however, that I think is important. That is the savings on a fairly small ranching family that would be -- that would enure to them by virtue of having what has gone on in this case available to them rather than having

to start all over again in a separate action. I'll limit my remarks on judicial economy to that.

The defendants also assert that by virtue of this intervention, there will be interjected into this suit additional issues which apparently they claim will somehow work to their prejudice. I think it is important to note three things in that regard, Your Honor. First, the test is not whether additional issues might be raised, but whether there are common questions of fact and of law which the defendant railroad parties simply do not dispute.

Secondly, the so-called additional issues which they refer to are, in reality, defenses which they may be asserting in this case. We are not raising those issues. We have not raised those issues. Our complaint or our proposed complaint in this matter is virtually identical to the complaint of the plaintiffs in the main action. The fact of the matter is that those are their issues, not ours.

Third, the so-called additional issues relate to three documents. Defendants have already completed substantial discovery as to each of those documents. The Court, when the appropriate time comes, can read and interpret those documents without imposing any prejudicial burden upon the defendant. It is a matter of interpreting those documents which say what they say when the time comes.

Finally and most interestingly, the railroad

IN THE

United States District Court

DISTRICT OF UTAH,
CENTRAL DIVISION

ANSCHUTZ LAND AND LIVESTOCK COMPANY, INC., a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation, *et al.*,

Defendants.

ANTELOPE COMPANY, a corporation,

Plaintiff,

v.

UNION PACIFIC RAILROAD COMPANY, a corporation, *et al.*,

Defendants.

JOSEPH O. FAWCETT & Sons, Inc., a Utah corporation, *et al.*,

Plaintiffs in Intervention.

Civil No. C-77-0390-J
Civil No. C-77-0389-J

EXHIBITS TO MEMORANDUM IN SUPPORT OF UNION PACIFIC DEFENDANTS' MOTION TO DISMISS THE SECOND AMENDED COMPLAINT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT

EXHIBIT D

UTAH DEEDS CONTAINING A RESERVATION OF THE "EXCLUSIVE RIGHT TO PROSPECT FOR COAL AND OTHER MINERALS" AS FOLLOWS:

Reserving, however to the said Union Pacific Railway Company the exclusive right to prospect for coal and other minerals within and underlying said lands and to mine for and remove the same if found and for this purpose it shall have right of way over and across said lands, and space necessary for the conduct of said business thereon without charge or liability for damage therefor.

Deed Nos.

20749
22826
22926

United States District Court

DISTRICT OF UTAH
CENTRAL DIVISION

ANSCHUTZ LAND AND LIVESTOCK,
Plaintiff,

v.

UNION PACIFIC RAILROAD,
Defendant.

Case No. C 77-390

Salt Lake City, Utah

November 1, 1983
9:30 a.m.

TRANSCRIPT OF MOTION
BEFORE THE HONORABLE BRUCE S. JENKINS

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KENT MURDOCK, ESQ.
DAVID OLSEN, ESQ.
WILLIAM CAYIAS, ESQ.

November 1, 1983 9:30 a.m.

PROCEEDINGS

THE COURT: Lets go ahead in the Anschutz matter, Anschutz Land and Livestock Company, Inc. versus the Union Pacific Railroad and others. It's C 77-390. We also have 77-389 and other related matters, here today on motions. Those who are making appearances, if you'll make a record for us, tell us who you are and whom you represent.

MR. ABRAMS: Floyd Abrams representing plaintiff Anschutz Land and Livestock Company, Inc. With me are my colleagues Rodney Snow, Dean Reindel, Leonard Spivak, Robert Martin and Lee Thompson.

MR. GRIBBON: On behalf of the Union Pacific defendants, Daniel Gribbon and Russell Carpenter and Sam Gauffin.

MR. WERLIEN: Ewing Werlein, Jr. on behalf of Amoco Production Company. With me is Paige Austin, Stephen Anderson and Kent Murdock.

MR. OLSEN: David Olsen and William Cayias representing the plaintiffs in intervention, the Fawcett family.

THE COURT: Anyone else. We've got the motion to dismiss and the motion for summary judgment. Have you selected the order in which you want to speak?

MR. GRIBBON: Your Honor, if it meets with your

Radke reservations as well.

In conclusion, we don't think they all mean the same thing. We don't think they can mean the same thing. We think it is illogical and ultimately incomprehensible for the railroad to get up and tell you that every bit of language they use no matter what they added, when they added, why they added and how firmly we can establish precisely what their intention was has absolutely no relevance and we can't have a trial to prove to to you. We think Nell establishes that and the other cases we've cited establish that, and we urge you to deny the summary judgment motion. Thank you.

MR. OLSEN: Thank you, your honor. May it please the court, the Fawcett family joins in the arguments so ably made by the plaintiffs in this case. The Fawcett family owns but six sections of land contained in this litigation, four of those involve the pre-1898 language. The defendants have claimed here today as to these lands and similarly situated lands the defendants' right of ownership is clear. We submit, your Honor, that that right is far from clear either by contract or by law.

First, the defendants have no record title to the property, despite the care and page upon page of drafting specific legal descriptions for property conveyed from the railway to the railroad, nothing describes the Fawcett lands. Thus, as one performs a search of the records of the Summit

County Recorder, as to the Fawcett property no interest of the railroad company appears as of record.

Second, the railroad defendants have never paid taxes on their mineral estate in the property. And, finally, for over approximately 80 years there was no development of the property by the railroad defendants or their successors.

Your Honor, we submit that if a careful lawyer chooses to convey a property interest he specifically lists that interest, that which he intends to convey, describes the property in detail in a form that can be recorded to protect his rights and to give the public notice. The reason the careful lawyer did not do that in this case was because there was nothing to convey to the railroad. With that, your Honor, we would respectfully request a chance to submit evidence on the issues and have the case heard on the merits. We would submit it.

MR. CARPENTER:: Since what you've heard near the end of Mr. Abrams' argument are the Radke issues and related issues that I spoke to, I will try to address them briefly, and following on that principle I'll start with what I heard at the end which is freshest in my mind which is the response that Mr. Abrams made to our question of what gives the plaintiffs any basis for title or claim of title to these minerals even if you assume they're right in their argument that the railway did not effectively convey the reserve

PURSUANT TO RULE 28.1

RESPONDENTS UNION PACIFIC RESOURCES COMPANY AND UNION PACIFIC LAND RESOURCES CORPORATION

Bear Creek Uranium Company
Black Butte Coal Company
Camas Prairie Railroad Company
Carbon County Coal Company
Corpus Christi Petrochemical Company
The Denver Union Terminal Railway Company
Esperanza Pipeline Company
Ferguson-Burleson County Gas Gathering System
Frontier Pipeline
Jefferson Southwestern Railroad Company
Kansas City Terminal Railway Company
Longview Switching Company
M-C Carbon Partnership
Medicine Bow Coal Company
The Ogden Union Railway and Depot Company
Portland Traction Company
Portland Terminal Railroad Company
The St. Joseph and Grand Island Railway Company
Southern Illinois and Missouri Bridge Company
Stansbury Coal Company
Stauffer Chemical Company of Wyoming
Trailer Train Company
Uinta Development Company
Union Pacific Corporation
Union Pacific Resources Ltd.
Upland Industries Corporation
The Weatherford Mineral Wells and Northwestern Railroad Company
Arkansas & Memphis Railway Bridge and Terminal Company
Automated Monitoring and Control International, Inc.
Central California Traction Company
Chicago and Western Indiana Railraod Company
Great Southwest Railroad, Inc.
Oakland Terminal Railway
Railroad Association Insurance Limited
St. Joseph Terminal Railroad Company
Terminal Railroad Association of St. Louis
Texas City Terminal Railway Company
The Belt Railway Company of Chicago
The Pueblo Union Depot and Railroad Company
Union Pacific Realty Company

RESPONDENT AMOCO PRODUCTION COMPANY

Amoco Corporation
Amoco Company
Amoco Credit Corporation
Analog Devices, Inc.
Cetus Corporation
Cyprus Mines Corporation
Gigabit Logic, Inc.
Packet Technologies, Inc.
Abbott Pipe and Supply Company
Automating Peripherals Ltd.
Blackfeet Indian Writing Co.
F M 4 Gila River Corporation
Gene Ables Excavation and General
Construction Co., Inc.
Highland Community Bank
High Life Helicopter, Inc.
Illiana Pallet Manufacturers Corporation
Illinois Venture Fund
Indecorp, Inc.
Rocky Mountain Instrument Company
Star/Adair Insulation Company
Superphone Corporation
TAC Systems
Tenco Hydro, Inc.
Trout Lake Golf and Country Club
Urban Enterprises Corporation
VSP Labs, Inc.
XMR Inc.
Watson Laboratories, Inc.

Respectfully submitted,

Daniel M. Gribbon

DANIEL M. GRIBBON
Counsel of Record

October 27, 1987